

No. 83-411

Office - Supreme Court, U.S.

FILED

OCT 17 1983

CLERK
JAMES L. STEVENS

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

GULF OIL CORPORATION,

Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
PHILADELPHIA GAS WORKS,
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
WASHINGTON URBAN LEAGUE,

Respondents

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

**BRIEF OF RESPONDENT
PHILADELPHIA GAS WORKS
IN OPPOSITION TO PETITION**

Joseph R. Davison*
LEONARD, TILLERY & DAVISON
Suite 400, 1530 Chestnut St.
Philadelphia, PA 19102
(215) 567-1530

Gabrielle Strich
PHILADELPHIA GAS WORKS
1800 North Ninth Street
Philadelphia, PA 19103
(215) 796-2482

*Attorneys for Respondent,
PHILADELPHIA GAS WORKS
Attorney of Record

TABLE OF CONTENTS

	Page
STATEMENT.....	2
1. The Contract	2
2. The 1976 Orders	2
3. 1981-82 Orders on Refunds and Interest .	3
4. The <i>Force Majeure</i> Proceeding	4
5. The Third Circuit Opinion	4
REASONS FOR DENYING THE PETITION ...	6
I. THE DECISION OF THE COURT OF APPEALS ON THE <i>FORCE MAJEURE</i> ISSUES IS, IN ACCORDANCE WITH APPLICABLE PRINCIPLES OF CONTRACT LAW AND PRIOR DECISIONS OF THIS COURT AND THE REMAND WAS PROPER UNDER THE COURT OF APPEALS POWER OF REVIEW	6
II. THE COMMISSION CORRECTLY RE-AFFIRMED ITS PRIOR HOLDINGS THAT GULF MAY NOT RECOUP INTEREST ACCRUED AFTER DECEMBER 15, 1976 ON THE CORPUS OF THE REFUND PAYMENTS	12
III. THE COMMISSION CORRECTLY HELD THAT RATES AND METHODS OF COMPUTING INTEREST ON THE REFUND CORPUS ARE SUBJECT TO THE PROVISIONS OF COMMISSION ORDERS NOS. 47 AND 47-A FOR THE PERIOD SUBSEQUENT TO OCTOBER 1, 1979	14
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:	Page
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320 (1958)	13
<i>Eastern Air Lines, Inc., v. McDonnell-Douglas Corp.</i> , 532 F.2d 957 (5th Cir. 1976)	9
<i>FPC v. Florida Power and Light Co.</i> , 404 U.S. 453 (1972)	10
<i>FPC v. Transcontinental Gas Pipe Line Corp.</i> , 423 U.S. 326 (1976)	11
<i>Gulf Oil Corp. v. FERC</i> , 706 F.2d 444 (3rd Cir. 1983)	passim
<i>Gulf Oil Corp. v. FPC</i> , 563 F.2d 588 (3rd Cir. 1977), cert. denied, 434 U.S. 1062 (1978), aff'g. <i>Gulf Oil Corp.</i> , 56 F.P.C. 2293, reh. denied, 56 F.P.C. 3492 (1976)	passim
<i>Hol-Gar Mfg. Corp. v. United States</i> , 351 F.2d 972 (Ct.Cl. 1972)	7
<i>Mobil Oil Corp. v. FPC</i> , 417 U.S. 283 (1974)	11
<i>Pennzoil Co. v. FERC</i> , 645 F.2d 360 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982)	7, 8, 10
<i>Permian Basin Area Rate Cases</i> , 390 U.S. 747 (1968)	9
<i>Philip Carey Mfg. Co. v. Labor Board</i> , 331 F.2d 720 (6th Cir. 1964)	15
<i>S.E.C. v. Chenery Corp.</i> , 318 U.S. 80 (1943)	11
<i>Skelly Oil Co. v. Phillips Petroleum Co.</i> , 339 U.S. 667 (1950)	15
<i>Texaco, Inc. v. FPC</i> , 290 F.2d 149 (5th Cir. 1961) ..	15
<i>Texas Gas Transmission Corp. v. Shell Oil Co.</i> , 363 U.S. 263 (1960)	8, 9, 11
<i>United Gas Improvement Co. v. Callery Properties Inc.</i> , 382 U.S. 223 (1965)	11, 15

TABLE OF AUTHORITIES

Cases	Page
<i>United States v. Brooks-Callaway Co.</i> , 318 U.S. 120 (1943)	9
<i>Vermont Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519 (1978)	10
<i>Victory Carriers, Inc. v. United States</i> , 467 F.2d 1334 (Ct.Cl. 1972)	7
<i>Wisconsin v. F.P.C.</i> , 373 U.S. 294 (1963)	8

ADMINISTRATIVE ORDERS AND OPINIONS

<i>Gulf Oil Corp.</i> , 17 F.E.R.C. 61513 (CCH 1981) (¶61264) (Order Denying Rehearing and Directing Refunds), on reh., 18 F.E.R.C. 61658 (CCH 1982) (¶61307) (Order Denying Applications for Rehearing and Reconsideration, Denying Motion to Reject and Strike Application, and Clarifying Order)	3, 4, 13
<i>Gulf Oil Corp.</i> , 56 F.P.C. 2293, reh. denied, 56 F.P.C. 3492 (1976), aff'd, <i>Gulf Oil Corp. v. FPC</i> , 562 F.2d 588 (3rd Cir. 1977), cert. denied, 434 U.S. 1062 (1978)	2, 3, 12, 14
<i>Rate of Interest on Amounts Held Subject to Refund</i> , FERC Statutes and Regulations 30545 (CCH 1979) (¶30083) (Order No. 47), on reh., FERC Statutes and Regulations 30712 (CCH 1979) (¶30099) (Order No. 47-A), adopting Notice of Proposed Rule, 44 Fed. Reg. 18,046 aff'd. (March 26, 1979), aff'd. <i>sub nom. United Gas Pipe Line Co. v. FERC</i> , 657 F.2d 790 (5th Cir. 1981)	14

STATUTES AND REGULATIONS

Natural Gas Act, 52 Stat. 821 (1938), 15 U.S.C. §§717, et seq. as amended: Section 19(b), 15 U.S.C. §17r(b)	8
--	---

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-411

GULF OIL CORPORATION,

Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
PHILADELPHIA GAS WORKS,
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
WASHINGTON URBAN LEAGUE,

Respondents

**BRIEF OF RESPONDENT PHILADELPHIA GAS
WORKS IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Respondent Philadelphia Gas Works¹ files its brief in opposition to Gulf Oil Corporation's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. Respondent was a petitioner below on the *force majeure* contract issue and an intervenor below supporting the Federal Energy Regulatory Commission² on the refund and interest rate issues.

1. Respondent Philadelphia Gas Works is a municipally-owned gas distribution facility and has no parent nor subsidiary corporation. The Philadelphia Facilities Management Corporation, a non-profit Pennsylvania corporation, operates Philadelphia Gas Works pursuant to a contract with the City of Philadelphia.

2. Hereinafter "Commission" refers to both the Federal Energy Regulatory Commission, a Respondent herein and below, and for dates prior to 10/1/77, its statutory predecessor, the Federal Power Commission.

STATEMENT OF THE CASE

In order to correct inaccuracies and material omissions in Petitioner's Statement, Respondent supplements that Statement in a corresponding format.

1. *THE CONTRACT*. The Gulf-Texas Eastern Warranty Contract has been the subject of prior judicial interpretation and construction.³ The findings in that previous court opinion concerning the obligations imposed by the contract constitute the law of the case, and are binding on the parties.

Those findings include the following:

(a) Gulf is obligated under the contract and the certificate of public convenience and necessity to deliver 625,000 MCF every day unless Texas Eastern demands less. 563 F.2d at 594-95.

(b) Gulf's delivery obligation is absolute in that it is contingent on nothing but Texas Eastern's demand. 563 F.2d at 595.

(c) The single most important provision of the contract is the provision by which Gulf "warrants" delivery of the contract quantities of gas without regard to source of supply.⁴ 563 F.2d 598-99.

2. *THE 1976 ORDERS*. With regard to the refund-recompment issue, the Commission in Opinion Nos. 780⁵ and 780-A⁶ determined that performance and refund obligations were to be imposed on Gulf for past failures to make warranted deliveries. First, Gulf was ordered to commence deliveries of 625,000 MCF per day to Texas Eastern on December 15, 1976. Second, Gulf

3. *Gulf Oil Corp. v. FPC*, 563 F.2d 588 (3rd Cir. 1977), cert. denied, 434 U.S. 1062 (1978). (Hereinafter "Gulf Oil I").

4. The warranty provision is contained in Article I, Paragraph 4 of the contract. This provision is set forth at 563 F.2d at 613, and also appears in the opinion below, App. 21a.

5. 56 FPC 2293 (1976).

6. 56 FPC 3492 (1976).

was ordered to refund a sum calculated as of December 15, 1976 to Texas Eastern for distribution to that pipeline's customers. Gulf was permitted to recoup this December 15, 1976 refund amount, when and if, it made specified excess deliveries in the future. The interest, or more properly stated time value of money, which would accrue to the refund amount after December 15, 1976, was to be retained by the proposed beneficiaries of the remedy, Texas Eastern's customers.⁷

In *Gulf Oil I*, the Third Circuit affirmed the Commission's refund-recoupment plan as an efficient, fair and reasonable exercise of discretion.⁸ As explained by the court, the Commission's remedial order was not intended as a measure of damages, but as a method of enforcing Gulf's compliance with its warranty obligation.⁹

Although Gulf did calculate the refund amount as of December 15, 1976, the amount was never distributed to Texas Eastern's customers. In fact, Gulf did not release control over that refund corpus until that sum, substantially reduced by excess delivery recoupment, was turned over to an escrow agent in 1982.

3. 1981-82 ORDERS ON REFUNDS AND INTEREST. In its December 18, 1981 Order,¹⁰ the Commission reaffirmed its prior determination concerning the compliance nature of the refund remedy and Gulf's loss of the time value on the December 15, 1976 refund amount.

In its subsequent Order of March 29, 1982,¹¹ the Commission further clarified these points, and explained in detail its use of the prevailing rates of interest on refunds for the past-December 15, 1976 period. The

7. 56 FPC at 2303; 56 FPC at 3505; *aff'd Gulf Oil I*, 563 F.2d at 607.

8. 563 F.2d at 607.

9. *Id.* at 609.

10. 17 FERC 61513 (1981); App. 65a-90a.

11. 18 FERC 61658 (1982); App. 91a-106a.

Commission noted that in its 1976 Order establishing the refund-recoupment plan it had imposed interest rates generally applicable to refund amounts, and thus, its current order was not a departure from previous findings. App. 94a-95a.

Of equal importance was the fact that the 1976 Commission opinion contemplated that Gulf would file its refund report on December 15, 1976 and payments to Texas Eastern customers would follow shortly thereafter. App. 94a. In reality, when the 1981-82 Orders were issued, Gulf still had not made any refund payments.

4. *THE FORCE MAJEURE PROCEEDING*. Respondent incorporates herein by reference the detailed and objective history set forth in the court's opinion below, pertaining to the 1979 hearings on *force majeure*, the administrative law judge's initial decision, and Commission Opinion No. 136. App. 13a-16a.

5. *THE THIRD CIRCUIT OPINION*. The Third Circuit reversed the Commission's Order allowing all of Gulf's asserted *force majeure* claims on two specific bases. First, the court found that the Commission's interpretation of the *force majeure* provision within the context of the refund remedy, rather than the contract, was not in accordance with the law. The *entire* quote on this point reads:¹² "We find that the Commission's definition of *force majeure* and its application of that definition to the refund payment plan was in legal error". App. 18a. Second, the court found that the Commission's Order pertaining to Gulf's proof of due diligence was not supported by substantial evidence. App. 18a, 23a-26a.

With regard to the first basis of reversal, the court held that the Commission had misconstrued the warranty obligation imposed by the contract. Re-emphasizing the *Gulf Oil I* decision the court of appeals

12. In contrast to petitioner's misquotation of this finding, Petitioner's brief, p. 7.

correctly pointed out that "the warranty is to have a specific quantity of gas available daily from an unidentified source of supply." App. 20a. However, the Commission in defining and applying the *force majeure* provision had ignored this *daily* warranty obligation and looked rather at Gulf's overall delivery obligation.

Finally, the court found that the Commission could not rely, as it had done, merely on Gulf's efficient cataloging of volumes attributable to *force majeure* events to support its order excusing performance. Under the warranty contract, it was incumbent upon Gulf to prove how it tried to overcome the effects of the events, and incumbent on the Commission to require and assess such proof. App. 24a-26a.

REASONS FOR DENYING THE PETITION

Respondent agrees that the case below presented important questions concerning the administration of the Natural Gas Act, the Natural Gas Policy Act, and the Federal Power Act. However, Respondent submits that these questions were properly and adequately resolved by the United States Court of Appeals for the Third Circuit.

I. THE DECISION OF THE COURT OF APPEALS ON THE *FORCE MAJEURE* ISSUES IS IN ACCORDANCE WITH APPLICABLE PRINCIPLES OF CONTRACT LAW AND PRIOR DECISIONS OF THIS COURT AND THE REMAND WAS PROPER UNDER THE COURT OF APPEALS POWER OF REVIEW

The brief filed by Petitioner serves only to distort the decision reached by the court of appeals. Petitioner's argument does little to clarify, but much to confuse, the proper resolution by that court of the issues involving *force majeure*.

1. Conspicuously absent from Petitioner's discussion of the Third Circuit's holding on the subject of *force majeure* is the fact that a *warranty* contract was at issue. Not once in Petitioner's discussion of this subject was this fundamental and distinguishing factor brought to this Court's attention.¹³ This oversight is most glaring, since the court of appeals finding of Commission error is specifically predicated on the warranty nature of Gulf's contractual obligation.

In its opinion, the court of appeals carefully and repeatedly pointed to the warranty as the basis for its decision.

"We find the Commission's definition in legal error *within the context of a warranty contract.*" App. 18a.

13. Petitioner's brief pp 15-24.

"Force Majeure events within a warranty contract can excuse the supplier's non-performance for events beyond its control only to the extent that the supplier has shown that it had available resources to meet its warranty obligation." App. 19a.

"We find that the Commission's definition of *force majeure* "is" inconsistent with the underlying warranty." App. 201.

"Our decision is based on the contract's *daily warranty*." App. 20a."

(Emphasis Added)

Contrary to Petitioner's mischaracterization, the court of appeals did not ignore the specific contract provisions at issue. What the court of appeals did was merely interpret the *force majeure* terms contained in Article X of the contract in the only manner which was logical and consistent with the primary warranty obligation imposed by Article I, Paragraph 4.¹⁴ In effect, the holding below employed well-settled principles of contract law, in considering the contract as a whole, and interpreting it so as to harmonize and give meaning to all of its provisions. *Victory Carriers, Inc. v. United States*, 467 F.2d 1334, 1342 (Ct. Cl. 1972); *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965).

2. Petitioner's contention that the court below erred in not applying a "state law" interpretation is without merit for a number of reasons. First, the doctrine enunciated in *Pennzoil Co. v. FERC* is not that state law is pre-emptive.¹⁵ Rather, state law is only used as an interpretative standard when it has been demonstrated that there are "differences between the general contract law

14. The relevant portions of Article X are set forth at App. 11a.; Article I, Paragraph 4 is quoted in the court's opinion at App. 21a.

15. *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982).

applied and any state contract law that may or may not be applicable."¹⁶ Moreover, the burden is on the party advocating the application of state law to demonstrate that such differences do in fact exist.¹⁷

Here, Petitioner has not only failed to meet this burden of demonstrating differences between state contract law and the general contract law applied, it has not even identified which, if any, state has an interest in the contract at issue.

The following passage from *Pennzoil* is instructive as to why that burden was not and could not be met:¹⁸

"Since the Uniform Commercial Code applies to natural gas as sales of goods (U.C.C. §2-107(1)) and all states except Louisiana have adopted the Uniform Commercial Code, variations between state law and general principles are likely to be few."

Second, there is no evidence that any precedential state law, either decisional or statutory, exists which addresses the novel situation present in this case — an unconditional warranty supply contract. As noted by the Third Circuit, "we were referred to no cases in which a *force majeure* clause is decided within a warranty contract context". App. 18a. Under such circumstances, the court's application of general principles of contract law was entirely appropriate. *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960).

Finally, this issue of state law interpretation, even in its generic sense, was never raised either before the Commission or the court of appeals. Not having been raised nor presented below, a step required by §19(b) of the Natural Gas Act¹⁹ in order to preserve a point for judicial review, the issue is not properly before this Court. *Wisconsin v. F.P.C.*, 373 U.S. 294 (1963).

16. *Id.* 645 F.2d at 383-84.

17. *Id.* 645 F.2d at 387.

18. *Id.*

19. *Natural Gas Act*, 52 Stat. 821 (1938), 15 U.S.C. §717r(b).

3. Petitioner's attempt to "split hairs" between this court's decision in *United States v. Brooks-Callaway Co.*, 318 U.S. 120 (1943) and the Fifth Circuit holding in *Eastern Air Lines, Inc. v. McDonnell Douglas Corporation*, 532 F.2d 957 (5th Cir. 1976) does little more than beg the question. It begs the question because it completely ignores the primary obligation imposed by the contract, Gulf's warranty to deliver specified volumes on a daily basis.

The court of appeals, after acknowledging that the *force majeure* clause is appropriate within a warranty contract, specifically noted that the application of such a clause differs from one in a non-warranty ordinary contract. App. 19a. The contracts in *Brooks-Callaway Co.* and *Eastern Air Lines* fall within the latter category, non-warranty ordinary contracts.

As early as *Gulf Oil I*, the Third Circuit had held that the warranty obligation required Gulf to have a specific quantity of gas available daily without regard to its source of supply. *Gulf Oil I*, *supra*. 536 F.2d at 598-99. In finding that the Commission had ignored the import of this warranty obligation in interpreting the *force majeure* provision, the court re-emphasized its prior holding. App. 20a.

The only interpretation of the *force majeure* provision which would be consistent with the warranty is that taken by the court of appeals. Gulf must show that the *availability* as well as the delivery of gas was affected by the occurrence of a *force majeure* event. The court of appeals was fully justified in making its own independent determination of the correct application of the governing principles. *Texas Gas Transmission Co. v. Shell Oil Co.*, *supra*.

As this Court has held, the Commission may not, absent evidence of injury to the public interest, relieve a regulated company of "its improvident bargain." *Permian Basin Area Rate Cases*, 390 U.S. 747, 821 (1968). The court below, in reversing the Commission's

exculpatory interpretation of the *force majeure* provision, carried out that mandate.

4. The contention that the court of appeals decision will create uncertainty in the natural gas industry concerning the law to be applied, especially with regard to issues of *force majeure*, is the easiest of the Petitioner's many tenuous points to refute.

As discussed earlier, state law applies only to the extent that it differs from generally accepted principles of contract law, and it has been demonstrated that such differences exist. *Pennzoil Co.*, *supra*. Here, there has been no demonstration whether or not any particular state's law would apply, or, even if it did, that a different result would have been reached.

The Petitioner's reference to the recent frequency in which the issue of *force majeure* has arisen in disputes over contractual take-or-pay obligations is equally specious. Those actions involve *non-warranty* ordinary contract obligations, unlike the issues presented in this case. The court of appeals decision, squarely and expressly rests on the warranty nature of Gulf's supply obligations and thus, is clearly distinguishable. That decision would have little, if any, precedential value in those proceedings.

5. In interpreting the obligations, and the corresponding burdens imposed by the warranty contract, the Commission did not rely on matters within its special competence as an administrative agency. The Commission's decision on *force majeure* did not involve the resolution of intricate technical issues requiring the agency's expertise and experience, as in *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972). In relieving Gulf of its burden to prove how it tried to overcome the results of *force majeure* events, the Commission was not engaged in a policymaking decision, as in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

What the Commission did is incorrectly construe, on a legal basis, the *force majeure* clause in relation to the daily warranty provision of the contract. App. 24a. By failing to take into consideration all relevant factors, the Commission's resulting order was not supported by substantial evidence. Under such circumstances, the reviewing court need not strictly defer to the administrative decision, but can make its own determination as to the proper interpretation to be given to the contractual terms. *Texas Gas Transmission Corp. v. Shell Oil Co.*, *supra.*; *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

The holding below did not prevent Gulf from asserting *force majeure* as a contractual defense to performance. It merely precluded the recognition of such a defense in the absence of relevant proof. Simply stated, Gulf had to prove that the source of supply was either unavailable or undeliverable due to a *force majeure* occurrence. App. 24a.

The court in its opinion only specified the evidentiary burdens which must be met under the warranty contract. Such action is entirely proper for a reviewing court. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 311-12 (1974); *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). On remand, the Commission is free to exercise its administrative discretion in determining the methods, procedures and time dimensions of any subsequent proceeding.

As such, the remand here is not analogous to that found improper in *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976). Here, the Commission is not under court order to conduct specific inquiries and to report back to the court without further administrative consideration. To the contrary, the Commission may modify its factual findings on the basis of further evidence, and amend its original order, as necessary. *Mobil Oil Corp. v. FPC*, *supra.*

II. THE COMMISSION CORRECTLY REAFFIRMED ITS PRIOR HOLDINGS THAT GULF MAY NOT RECOUP INTEREST ACCRUED AFTER DECEMBER 15, 1976 ON THE CORPUS OF THE REFUND PAYMENTS

When the refund-recoupment remedy was established by the Commission in 1976, and affirmed on appeal in 1977, that remedy called for the distribution of the December 15, 1976 calculated "refund corpus" directly to Texas Eastern's customers. It was explicitly understood, as indicated by the following passages, that Gulf would lose all control of, and benefit derived from, those funds while in the hands of the customers who had been deprived of critical supplies by Gulf's default.

In opinion No. 780, the Commission made the following statement:²⁰

"Over the entire contract, Gulf would have received exactly the contract price for all 4.4 Tcf, but it would, in effect, have been required to lose the time value of its money required to compensate its customers for their losses due to Gulf's non-delivery in accordance with the terms of the contract".

In its order on rehearing, Opinion No. 780-A, the Commission rejected the contention that Gulf should have the right to recoup an amount equal to the loss of present value of such funds. As then stated by the Commission, "Gulf's loss of the time value of the amounts refunded is simply a proper reflection of loss suffered by Texas Eastern's customers from Gulf's failure to deliver its contract or certificate volumes of gas".²¹

In *Gulf Oil I*, the Third Circuit in addressing this issue stated, "our concern in this case is with the proce-

20. 56 FPC at 2303.

21. 56 FPC at 3502.

ture which will ultimately result in a loss to Gulf of nothing more than the time value of the money". 563 F.2d at 607.

Despite the binding and final nature of those holdings, Gulf, in the proceeding below, attempted to utilize the confusion generated by subsequent events, in an effort to lay claim to funds, i.e., the post-December 15, 1976 interest, which rightfully belonged to Texas Eastern's customers. Those subsequent events included Gulf's unsuccessful appeal, Gulf's retention of control over the refund corpus until 1982, and the establishment of an escrow account in lieu of direct distribution of the refund. As explained by the Commission in its March 29, 1982 order:²²

"Whatever the reasons for the delay in actual re-funding, the fact remains that Gulf retained and had the use of money which it had been determined in Opinion Nos. 780 and 780-A belonged to TETCO's customers until Gulf recouped the refund corpus. This is why Gulf is not allowed to recoup any interest for the post-December 15, 1976 period". App. 97a-98a.

It is thus obvious that the Commission did not, as Gulf contends, modify its previous orders, but merely restated and reaffirmed those orders. As Gulf correctly points out, those orders having been subject to previous judicial review are final and binding on all parties and are not subject to challenge in subsequent proceedings. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 339-341 (1958). Gulf is barred from attempting to relitigate these identical issues.

22. 17 FERC 61513 (1981).

III. THE COMMISSION CORRECTLY HELD THAT RATES AND METHODS OF COMPUTING INTEREST ON THE REFUND CORPUS ARE SUBJECT TO THE PROVISIONS OF COMMISSION ORDERS NOS. 47 AND 47-A FOR THE PERIOD SUBSEQUENT TO OCTOBER 1, 1979

Petitioner's protests of inadequate notice and prejudice are unwarranted for at least two reasons. First, in Opinion No. 780-A, the Commission specifically advised all parties of the methodology employed in setting the interest rates for the refund remedy. There the Commission stated:²³

"Gulf contends that the seven (7) percent rate of interest until October 10, 1974 and nine (9) percent thereafter is unreasonable and without basis because the Commission's Order Nos. 442 and 513-A apply to amounts collected subject to refund under rate filings for proposed rate increases. These orders were adopted to prescribe uniform rate of interest in rate suspension cases reflecting current conditions in the money market. There is no reason to adopt a different interest rate in this proceeding."

It is evident from the above-cited passage that Gulf was aware that the Commission was employing its general interest rates, and that therefore, any change in those rates would be applicable once they had been enacted. Such a change did come to pass when the Commission issued Orders Nos. 47 and 47-A in September and November of 1979 respectively.²⁴

23. 56 FPC at 3504.

24. Rate of Interest on Amounts Held Subject to Refund, FERC Statutes and Regulations §30083 (CCH) (Order No. 47) (September 10, 1979), on reh. FERC Statutes and Regulations §30099 (CCH) (order No. 47-A) (November 8, 1979). These orders provided that as of October 1, 1979, interest rates under Section 4 of the Natural Gas Act and under Title I of the NGPA should be computed using prime rates and should be compounded quarterly. See 18 C.F.R. §§35.19(c)(2), 154.67(d)(2), and 154.102(d)(2).

Second, and more important, is the fact that the only reason that the dictates of Orders Nos. 47 and 47-A came into play in this appeal is that Gulf, as of October 1, 1979, and for almost three years later, still retained control of the refund corpus. Such an event had not been anticipated when either the Commission's prior orders were issued in 1976 or the court of appeals affirmed those orders in *Gulf Oil I*.

In order to correct the inequities that would have resulted from this change in circumstances, the Commission properly exercised its discretionary powers by holding that its general interest rates effective as of October 1, 1979 would apply to the refund corpus, which at that time was still in Gulf's hands. Quite simply, what the Commission did in holding that the prevailing interest rates under orders 47 and 47-A should apply is retune its prior remedial order, in order that its award to Texas Eastern's customers of the "time value of money," would not be rendered a nullity by the passage of time. Since Gulf had the use of the funds, its objection to the Commission's order on applicable interest rates, on a notice or other basis, is groundless. *Skelly Oil Co. v. FPC*, 401 F.2d 726 (10th Cir. 1968).

As this Court has held, the imposition of interest is an appropriate means of preventing unjust enrichment. *United Gas Improvement Co. v. Callery Properties, supra.*, 382 U.S. at 230. Any other holding by the Commission would have validated a retention of funds by Gulf in a manner that would have amounted to unjust enrichment. See, *Texaco Inc. v. FPC*, 290 F.2d 149, 157 (5th Cir. 1961); *Philip Carey Manufacturing Co. v. Labor Board*, 331 F.2d 720, 729-31 (6th Cir. 1964).

For Gulf to argue that it, rather than the customers who were aggrieved by Gulf's default, suffers harm as a result of the Commission's order pertaining to the proper rate of interest is unwarranted. The Commission's holding is neither arbitrary nor capricious, but rather is rationally based and constitutes a valid exercise of the Commission's discretionary powers.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Joseph R. Davison*
LEONARD, TILLERY & DAVISON
Suite 400, 1530 Chestnut St.
Philadelphia, PA 19102
(215) 567-1530

Gabrielle Strich
PHILADELPHIA GAS WORKS
1800 North Ninth Street
Philadelphia, PA 19103
(215) 796-2482

Attorneys for Respondent
PHILADELPHIA GAS WORKS
**Attorney of Record*

October 15, 1983